Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Denver, Colorado Metropolitan Statistical Area	))))	WC Docket No. 07-97
In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Minneapolis- St. Paul Metropolitan Statistical Area	))))	WC Docket No. 07-97
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COMMENTS OF THE
NEW JERSEY DIVISION OF RATE COUNSEL

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Date: August 31, 2007

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I. INTRODUCTION

In response to the Public Notice released on June 1, 2007,[1] the New Jersey Division of Rate Counsel ("Rate Counsel") (formally the New Jersey Division of the

[1]/ See Public Notice, DA-07-2291, dated June 1, 2007, establishing pleading cycle with Comments due on July 17, 2007and reply comments due on August 16, 2007. On July 6, 2007, Public Notice, DA-07-3042 was issued changing the due dates for comments to August 31, 2007 and reply comments to October 1, 2007.

Ratepayer Advocate)[2] ("Ratepayer Advocate") hereby submits its comments in response to DA 07-2291 and various petitions asking for forbearance with regard to certain provisions of the Federal Telecommunications Act of 1996. On April 27, 2007, Qwest Corporation (Qwest") filed four petitions asking for forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas ("MSAs").

In the petitions, Qwest asks the Commission to forbear from loop and transport unbundling obligations pursuant to Sections 251(c) and 271(c)(2)(B)(ii) of the Act, and Section 51.319(a), (b), (e) of the Commission's Rules. For mass market and enterprise services, Qwest also seeks forbearance from Part 61 dominant carrier tariffing requirements (47 CFR §§ 61.32, 61.33, 61.38, 61.58, 61.59); Part 61 price cap regulation (47 CFR §§ 61.42-61.49); *Computer III* requirements, including CEI and ONA

[2]/ Effective July 1, 2006, the New Jersey Division of the Ratepayer Advocate is now Rate Counsel. The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jersey citizens who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Whitman's Reorganization Plan. See New Jersey Reorganization Plan 001-1994, codified at N.J.S.A. 13:1D-1, et seq. The mission of the Ratepayer Advocate was to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that were just and nondiscriminatory. In addition, the Ratepayer Advocate worked to insure that all consumers were knowledgeable about the choices they had in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (N.J.S.A. 52:27EE-1 et seq.). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings … as the Public Advocate deems shall best serve the public interest," N.J.S.A. 52:27EE-57, i.e., an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A.52:27EE-12; The Division of Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of Rate Counsel represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates in Federal and state administrative and judicial proceedings.

requirements; and dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's Rules concerning the process for acquiring lines, discontinuing services, assignment of transfers of control, and acquiring affiliation (47 CFR §§ 63.03,63.04, 63.60-63.66). Qwest claims that multiple competitive alternatives are available to mass market and enterprise customers alike, including wireline and cable-based services. Qwest also claims that intermodal competitive competition, particularly from wireless and voice over Internet Protocal (VoIP) providers is more advanced than it was in the Omaha MSA in 2005, when the Commission granted forbearance to Qwest.

II. SUMMARY

Rate Counsel urges the Commission to deny all four petitions due to the petitioner's failure to meet the standards of proof set forth in Section 160 of the Telecommunications Act of 1996, which is required before the Commission can exercise its forbearance authority.

The forbearance standard in Section 160 is only allowed where the enforcement of the regulation or section of the Act at issue is not necessary to ensure that charges, practices, classifications or regulations are just and reasonable and are not unjustly or unreasonably discriminatory, not necessary for the protection of consumers, and is in furtherance of the public interest.[3] Rate Counsel submits that Qwest has failed to demonstrate that each element required for forbearance has been met. If the petitions are granted, consumers will be exposed to an unregulated duopoly without necessary safeguards to ensure that rates, terms and conditions are just, fair, and reasonable;

[3]/ 47 U.S.C. § 160(a).

consumers will have no protections to ensure that cross subsidization is not occurring, and consumers will be denied the promise of the Act, more choice, technological innovation and lower prices.

The grant of the petitions will jettison the goals of the Act and foreclose the possibility of new entrants to enter the marketplace. The petitions call for the complete elimination of unbundling of loops and transport under Sections 251 and 271. If granted, new entrants will be left with only the option of competing through the deployment of their own facilities. There has been no showing that any new entrant can economically compete by facility-based deployment. With such evidence, there is no basis for meeting the criteria required for granting forbearance in the first instance.

Rate Counsel also submits that unless and until other major Commission proceedings and issue are resolved, the findings required for granting forbearance cannot be made on a reasoned basis. By way of example, the separation freeze (which distorts pricing at the state and federal arenas), intercarrier compensation (which affects rates and the subscriber line charge), special accesses review (which affects rates at the local and interstate jurisdictions), the failure of states to reform the intrastate access rates (which affects competitors ability to compete), the regulatory classification of over the top VoIP and facility based ViOP, impact whether the pubic interest and consumers are protected and served. With respect to the special access review, Rate Counsel incorporates by reference it comments filed in that proceeding. Rate Counsel's comments further support why Qwest's relief for special access is not in the public interest and identifies the harms

flowing to consumers.[4]

In addition, Rate Counsel notes that AT&T Corporation has filed a petition asking for forbearance from service quality and other reporting requirements related to ARMIS.[5] Rate Counsel incorporates by reference its comments and attachments thereto. The arguments raised therein further reinforce why the grant of Qwest's petition is not in the public interest. If the Qwest petition is granted along with the AT&T petition, cumulatively consumers will be harmed and competition further eroded. Furthermore, the elimination of Qwest's obligations to connect their facilities with other carriers who provide competing broadband services and Qwest's ability and propensities to discriminate against carriers violates the first prong of the forbearance test. The forbearance petitions also violate the second prong of the forbearance test that requires Qwest to demonstrate that enforcement of the specific regulation is not necessary for the protection of consumers. Rate Counsel submits that the maintenance of network neutrality is critical because it allows consumers the freedom to access content, run applications and use equipment of their choice. Network neutrality obligations also allow

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[4]/ *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC WC Docket No.05-25; RM-10593, Comments of the New Jersey Division of the Ratepayer Advocate, June 13, 2005 ("Rate Counsel initial comments, June 13, 2005") and Reply Comments of the New Jersey Division of the Ratepayer Advocate, July 29, 2005 ("Rate Counsel reply comments, July 29, 2005"); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC WC Docket No.05-25; RM-10593, Comments of the New Jersey Division of Rate Counsel, August 8, 2007 and Reply Comment of the New Jersey Division of Rate Counsel, August 15, 2007.

[5]/ Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission's ARMIS Reporting Requirements, filed June 8, 2007 ("AT&T Petition"). Rate Counsel filed comments on August 20, 2007 opposing the petition, WC Docket No. 07-139. Reply comments are due September 19, 2007.

customers to switch from one broadband service to another service provider if they were dissatisfied with service. If these petitions are granted, any customer of these petitioners who wants to switch to another broadband provider may no longer be able to do so.

The forbearance petitions also fail to satisfy the third prong of the forbearance test that examines whether the forbearance is in the public interest. Rate Counsel submits that the grant of these petitions, if approved, will result in higher prices, fewer alternatives, and decreased service quality. Furthermore, Qwest's argument that competition from cable modem and other alternative broadband providers does not support its request for forbearance because DSL has been making significant headway in the broadband marketplace and ILECs' share of the DSL market has grown while DSL competitors have lost market share. Section 706 of the Act does not grant or bestow upon the FCC the exclusive right to promote broadband. There is nothing in the Act that permits the FCC to preempt states from promoting and regulating broadband. There is no clearly expressed Congressional intent to remove the role of states in promoting broadband. To use forbearance to preclude or limit states in regulation broadband is constitutionally infirmed.

Notwithstanding the fact that each of these forbearance petitions are without merit and should be denied by the Commission based on the reasons discussed above, Rate Counsel renews the arguments and incorporates those arguments hereto with respect to the constitutional infirmities associated with the Commission's forbearance authority. Specifically any exercise of the forbearance authority contained in Section 10 of the Act violates separation of powers, equal protection, 10th Amendment, and 11th Amendment as outlined in detail in our Ex Parte filing dated December 7, 2004 in the UNE Remand

proceeding (CC Docket No. 01-338 and WC Docket No. 04-313).

Each petition is without merit and should be denied. Each petition lacks empirical and evidentiary support and offers mere conclusions in support of the petition.

III. THE PETITIONS SHOULD BE DENIED.

The four petitions for the most part repeat and offer mere conclusions without record support as to why each of the criteria for granting forbearance is satisfied. Rate Counsel incorporates by reference the comments and replies filed in opposition to the grant of the Verizon's petition and relies upon them as further support as to why the current petitions fail to satisfy Section 10 of the Act.[6] In addition, Rate Counsel notes that Commissioner Copps recent dissent in approval of the transfer of control of Adelphia's cable operations to Comcast Corporation and Time Warner Inc., fully justifies why the grant of these petitions are not in the public interest. Broadband is monopolized by RBOCs and large cable companies.[7] Commissioner Copps concluded that:

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[6]/ See In the Matter of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160 (c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket No. 04-440.

[7]/ See **DISSENTING STATEMENT OFCOMMISSIONER MICHAEL J. COPPS** in *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor to Comcast Corporation, Transferee*, Memorandum Opinion and Order (MB Docket No. 05-192).

> We all know the future of communications is broadband. I am worried that this decision tightens the grip that cable companies share with telephone companies over our nation's broadband access. FCC data show **that these two industries control some 98 percent of the broadband market**. Despite this, the majority's Order goes on at length about the supposedly competitive broadband market. Indeed, the competitive picture the majority spins is at odds with too many other reports. A few weeks ago, the Congressional Research Service characterized the broadband market as a "cable and telephone duopoly." Just last week, the International Telecommunications Union (ITU) released its Digital Opportunity Index. It's a more nuanced metric than the broadband penetration statistics the ITU employed to peg the United States at 16th in the world in broadband penetration this past year. On this new assessment of digital opportunity, your country and mine is ranked 21st. Right after . . . Estonia. If we want to continue to lay claim to the United States as the Land of Opportunity, we'd better find a way to make this country the Land of Digital Opportunity. Placing more control in a handful of entrenched broadband providers may not be the best way to go about it. (emphasis added)
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> I also am disappointed that this Order gives such short shrift to network neutrality. It has been our practice to condition recent mergers of this scale on enforcement of the four principles of the Internet Policy Statement that the Commission adopted last year. But here we backtrack and are too timid to even apply them in an enforceable fashion to the transaction at hand. More than that, I believe the Commission needs to consider the addition of a fifth principle to its Internet Policy Statement. We are entering a world where big and concentrated broadband providers are searching for new business models and sometimes even suggesting that web sites may have to pay additional charges and new tolls for the traffic they generate. This could change the character of the Internet as we know it. To keep our policies current, we need to go beyond the original four principles and commit industry and the FCC to a specific principle of enforceable non-discrimination, one that allows for reasonable network management but makes clear that broadband network providers will not be allowed to shackle the promise of the Internet in its adolescence.

No amount of unsupported rhetoric can overcome the facts that grant of these various petitions will not promote the public interest and protect consumers. Rate Counsel also incorporates by reference its comments filed in *I/M/O Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial*

Regulatory Review Separate Affiliate Requirement of Section 64.1903 of the Commission's Rules, WC Docket No. 02-112, CC Docket No. 00-175, FCC 03-111, Further Notice of Proposed Rulemaking (2003). ("*FNPRM*"). In particular, even if the FCC were to grant the petitions-which it should not- Rate Counsel submits that at a minimum, the FCC should continue to impose non-structural safeguards requirements of Section 64.1903[8] should be applied to the RBOCs and to cable companies and continues to be applied to independent LECs and cable companies to provide disincentives to engage in discriminatory behavior.

The protections of Section 64.1903 are necessary to accomplish the goals and objectives of the Act, especially in an ever-shrinking telecommunications market. While the 1996 Act fostered competition, and in turn the prospects of competition fueled economic growth, investment and development, the prospect of a return to monopolistic control can overpower economic investment, development, and enthusiasm, an outcome the FCC must take definitive steps to avoid. Rate Counsel also submits that if any relief were granted, such relief should be considered an exogenous event and cause revisions to rate cap filings at the Federal level for Qwest.[9] It simply not in the public interest to grant the petitions when important matters such as but not limited to separations, universal service, and intercarrier compensation remain open and unsettled. The current rate cap

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[8]/ Section 64.1903 requires that interexchange carriers affiliated with independent LECs would be regulated as non-dominant provided that the affiliate providing interstate interexchange services: (1) maintain separate books of account, (2) not jointly own transmission or switching facilities with its affiliated exchange telephone company; and (3) acquire any services from its affiliated exchange telephone company at tariffed rates, terms, and conditions. *See Competitive Carrier Fifth Report and Order*, 98 FCC2d at 1198, para. 9.

[9]/ See *In the Matter of AT&T Inc. for Waiver of the Commission's Rules to Treat Certain Local Number Portability Costs Under Section 61.45(d)*, CC Docket No. 95-116, Order (FCC 06-97) (rel. July 10, 2006). Rate Counsel submits that removal of broadband from Title II regulation should trigger a downward adjustment to federal rate caps when all other exogenous events are considered.

regime is undermined by the failure of the FCC to reinitialize and adjust rate caps to reflect regulatory changes. To grant these petitions, when rates remains distorted and to abandon the protections afforded by Title II is simply not in the public interest.[10] Rate Counsel also notes that Qwest's petitions completely ignore that fact that the services offered by cable companies for the mass market include only the bundled product market. Cable companies do not offer a stand alone local service or a stand alone long distance product to mass market customers. The FCC has identified three relevant product markets for the mass market, the basic local service, long distance, and bundles (local and long distance combined). Since cable companies do not offer services in all relevant product markets, Qwest's petitions do not meet the criteria for granting forbearance.

IV IF THE FCC IMPOSES CONDITIONS IN ORDER TO GRANT FORBEARANCE, THOSE CONDITIONS MUST BE SUBJECT TO NOTICE AND COMMENT BEFORE THEY CAN BE IMPLEMENTED.

Rate Counsel notes that the FCC in approving ACS of Anchorage, Inc. imposed a number of conditions as necessary to protect consumers.[11] Rate Counsel submits that the unilateral implementation of conditions in forbearance proceedings that are contested matters is a denial of due process and arbitrary, capricious, and agency action lacking a reasoned basis. Rate Counsel submits that all parties should be afforded the opportunity to weight in and propose alternative conditions to the extent such conditions affect

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[10]/ The petitions also fail to specifically identify the sections of Title II for which forbearance is requested. This alone is an adequate basis to reject the petitions. Title II of the Act encompasses 38 areas (sections) which are within the scope of the forbearance requested.

[11]/ See *I/M/O ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, FCC 07-149 (released August 20, 2007)

whether the statutory criteria for granting forbearance are met as a matter of law. The unilateral imposition of conditions without opportunity to contest or support is a denial of due process.

V. CONCLUSION

The Commission should not grant the petitions. Ultimately, the grant of any relief would harm ratepayers. Such a result is contrary to the public interest. Therefore, Rate Counsel urges that the FCC deny the petitions.

Respectfully submitted,

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